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PERBADANAN PEMBANGUNAN PULAU PINANG

v.

TRIKKON CONSTRUCTION SDN BHD

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COURT OF APPEAL, PUTRAJAYA
SULAIMAN DAUD JCA
SYED AHMAD HELMY JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: P-01-615-2010]
18 NOVEMBER 2011

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ARBITRATION: *Award - Interim award - Setting aside - Application for - Claims pleaded in impugned paragraphs - Whether valid applications - Whether arbitrator misconstrued clause in contract - Whether claims by contractor complied with conditions of contract - Whether claims maintainable*

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The appellant and respondent were parties to an arbitration proceeding. At their request, the arbitrator issued an interim award on several preliminary issues. On one of those issues, the arbitrator held the claims pleaded by the respondent in two paragraphs ('the impugned paragraphs') of the respondent's points of claim were valid. Those claims were related to direct loss/expense incurred by the respondent's contractor in complying with the project architect's instructions to carry out variation works. The mode of raising the claim was prescribed in cl. 11(6) of the Conditions of Contract ('cl. 11(6)') which required the contractor to make a written application to the architect with respect to the direct loss/expense within a reasonable time of its being incurred to allow either the architect or the quantity surveyor to ascertain the amount involved. In the instant case, the respondent did not make such an application but reserved its right to make a claim each time it was instructed to carry out variation work. The arbitrator held such reservation of right amounted to an application for the purpose of cl. 11(6) because there was no express requirement that the application should take a particular form or be accompanied by supporting documentary evidence. The arbitrator held there was nothing wrong in the respondent making an initial application containing information of heads and amounts claimed and, at a later date, providing documentary evidence of the claim ('the two-stage approach'). The appellant applied to the court to set aside the interim award on the ground that the decision was bad in law. Alternatively, it sought an order that the arbitrator reconsider the claims pleaded in the impugned paragraphs.

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Held (claims in impugned paragraphs not maintainable in arbitration)

Per Anantham Kasinather JCA delivering the judgment of the court:

(1) The arbitrator completely misdirected himself in law on the construction of cl. 11(6) constituting an error on the face of the record which warranted the court's intervention under s. 24 of the Arbitration Act 1952. The claims pleaded in the impugned paragraphs were not valid applications under cl. 11(6) and consequently, the respondent was not entitled to maintain them in the arbitration. (paras 12 & 15)

(2) The court was unable to agree with the two-stage approach adopted by the arbitrator. On a proper construction of cl. 11(6) the respondent was obliged to lodge a formal application containing his claim with the architect as soon as it became apparent the particular variation ordered by the architect for the project had caused the contractor losses. (para 9)

(3) The lodging of a claim by way of application to the architect for the project was a pre-requisite to pursuing a claim under cl. 11(6). The respondent's act of merely reserving its right to make such a claim at such time as it unilaterally deemed fit clearly did not meet this pre-requisite. (para 9)

Case(s) referred to:

Cairn Energy India Pty Ltd & Anor v. The Government of India [2010] 2 CLJ 420 CA ***(refd)***

FG Minter Ltd v. Welsh Health Technical Services Organisation [1980] 13 BLR 1 ***(refd)***

Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd [2004] 1 CLJ 743 FC ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 24(2)

Other source(s) referred to:

Ir Harbar Singh KS, *"Demystifying Direct Loss and/or Expense Claims"*, [2007] 4 MLJ xxix

Vincent Powell-Smith, *The Malaysian Standard Form of Building Contract*, p 45

For the appellant - V Sithambaran (P Navaratnam with him); M/s Sitham & Assocs

For the respondent - M Kanesan (Clement Cheng with him); M/s Clement, Dawn & Assocs

[Appeal from High Court, Pulau Pinang; Originating Motion No: 25-28-2010]

Reported by Ashok Kumar

JUDGMENT

Anantham Kasinather JCA:

[1] The appellant and respondent are parties to an ongoing arbitration in Penang. The parties by agreement required the Arbitrator to make an interim award on several preliminary issues which the parties wanted determined prior the hearing of the arbitration proper. The learned Arbitrator made the interim award dated 31 December 2009 (see p. 562 of Bahagian Jilid 7).

[2] The appellant then applied by motion to *inter alia* set aside the Interim Award, on the grounds that the Arbitrator had misconducted himself and that there are errors on the face of the record pursuant to s. 24(2) of the Arbitration Act 1952. An alternative prayer sought in the Motion was for the award in respect of Preliminary Issue number 2 that the claims in paras. 15.A9 and 15.A10 of the points of claim be remitted for the reconsideration of the Arbitrator Mr Lim Chong Fong. Similar prayers were included in respect of Preliminary Issues numbers 3, 6 and 7.

[3] Before us counsel for the appellant did not seriously pursue the principal prayer for the interim award to be set aside but submitted at length on the alternative prayers. Preliminary Issue number 2 as framed by the Arbitrator reads as follows:

> whether the notices of claim made by the claimant in relation to clause 11(6) of the Conditions of Contract for direct loss and/or expense arising from instructions requiring variations issued by the Architect as pleaded in paras. 15 A.8, 15.A. 9, 15A.10, 15.A. 11 and 15B. 5 of the points of claims constituted valid applications pursuant to the aforesaid clause (hereinafter referred to as 'Preliminary Issue No. 2').

Clause 11(6) reads as follows:

> If upon written application being made to him by the Contractor, the Architect of the opinion that a variation or … has involved the Contractor in direct loss and/or expense for which he would not be reimbursed by payment in respect of a valuation made in accordance with the rules contained in sub-clause (4) of this condition and if the said application is made within a reasonable time of the loss or expense having being (sic) incurred, then the Architect shall either himself ascertain or shall instruct the Quantity Surveyor to ascertain the amount of such loss or expense. Any amount from time to time so ascertained shall be added to the Contract Sum, and if an Interim Certificate is issued after the date of ascertainment any such amount shall be added to the amount which would otherwise be stated as due in such certificate.

[4] Counsel for the appellant submitted in respect of preliminary issue number 2 that for the respondent to advance such a claim before the Arbitrator, the respondent must satisfy the following conditions: A

(i) The respondent must have made written applications to the Architect;

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(ii) Such applications ought to have been made within a reasonable time of the loss or expense having been incurred;

(iii) Although the written applications need not be in any particular form, they must be in sufficient detail to enable the Architect to know upon what question he was required to form an opinion; C

(iv) Obviously full information relating to the claims and reasons as to why the valuation under cl. 11(4) was not sufficient compensations must be given;

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(v) The application must relate to direct loss and/or expense which has already been incurred;

(vi) And successive applications must be made in respect of continuing direct loss and/or expense;

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(vii) Any amount ascertained under cl. 11(6) must be included in the interim certificate next issued after the Architect's decision on the claim.

(See The Malaysian Standard Form of Building Contract by Vincent Powell-Smith at p. 45 - Also see the decision of English Court of Appeal in the case of *FG Minter Ltd v. Welsh Health Technical Services Organisation* [1980] 13 BLR 1). F

[5] Counsel for the respondent on the other hand countered the submission of the appellant by contending that there was nothing in cl. 11(6) which precluded the Arbitrator from adopting a two-stage approach to the respondent's claim. Counsel referred the court to the case of *Cairn Energy India Pty Ltd & Anor v. The Government of India* [2010] 2 CLJ 420. In truth, the decision of Suriyadi JCA (as His Lordship then was) in this case concerned whether there was manifest error on the face of the award and had nothing to do with the two-stage approach. The Arbitrator, on the other hand, appears to have accepted the two-stage approach based on the article "*Demystifying Direct Loss and/or Expense Claims*" [2007] 4 MLJ xxix by Ir Harbar Singh KS. G H

[6] Counsel for the respondent also relied on the conduct of the architect as affording a justification, alleging that there was no complaint whatsoever by the Architect that the claims had been submitted late and/or that because of delay he was unable to form any opinion on the I

A respondent's claims. In any case, the Architect was not a stranger to the said contract or the contract works. Furthermore, that the Architect could have called for supporting documents or directed the respondent to produce the documents within a certain period of receipt of the said notification, which he did not do at all.

B **[7]** The facts of this case reveal that the respondent did not make any application for direct loss and/or expense at anytime immediately following the variation orders originating from the Architect. Instead, what the respondent did was to reserve his right to make such a claim each time he was served with a variation. The respondent did this by C using the following words:

> These Architect's Instructions and Site instruction have affected our site programme and revised construction period. We will submit expenses, losses and other claims incurred as a result of the said architect's instruction and side instruction in due course" (see p. 548 D Jilid 6 Bahagian C)

[8] The Arbitrator considered this reservation of right as amounting to an application for the purposes of cl. 11(6) of the contract. The Arbitrator's reasons were that there was no specific express requirement E that the application must take a particular form or be accompanied with particulars of document in substantiation of the application. The Arbitrator also made reference to cl. 30(5) of the contract and ruled that to the extent that the final valuation is undertaken within a reasonable time after practical completion there is no reason why the respondent F should not be allowed to pursue a two-stage approach. Under this two-stage approach, the Arbitrator opined that the initial *onus* on the contractor was to make an initial application containing information of the heads and amount claimed and to thereafter at a subsequent point of time provide documentary evidence of the claim (see para. 16 of the Interim Award).

G **[9]** With respect, we are unable to agree with the two stage approach adopted by the Arbitrator. In our view, on a proper construction of cl. 11(6) of the contract, there is an obligation on the respondent to lodge a formal application containing his claim with the Architect as soon H as it becomes apparent to the respondent that the particular variation ordered by the architect for the project has caused loss to the contractor. We concede that the contractor may not be able to produce all of the supporting documents when making the application and should therefore be allowed to produce further documents at a subsequent stage. I However, in our opinion, this concession does not detract from the fact that under cl. 11(6) of the contract the lodging of the claim by way of application to the architect for the project is a pre-requisite to the pursuit

of a claim under this clause. The respondent's act of merely reserving its right to make such a claim at such time as it unilaterally deemed fit clearly does not meet this pre-requisite.

[10] On the facts of this case, it is not in dispute that the works were completed on 14 January 1987 and the certificate of practical completion issued on 17 February 1987. The variation orders which pursuant to the Cl. 11(6) required applications under cl. 11(6) were all issued on diverse dates in 1986 (see p. 548 of Bahagian C Jilid 6). The claims were lodged purportedly pursuant to cl. 11(6) with the architect only on 18 April 1987 and 19 September 1987 (see para. 17 of the Interim Award at p. 575 of Bahagian C Jilid 7).

[11] In our opinion, the construction placed by the Arbitrator on cl. 11(6) of the contract is erroneous on the face of the record for the following reasons:

(a) The Arbitrator whilst acknowledging in para. 16 of the Interim Award that there was an initial *onus* on the contractor to "at least state the heads and amount claimed" before the onus shifts to the architect, failed to realise that the initial notice originating from the respondent's contractor merely purported to reserve the right of the respondent to make claims and did not contain any heads of loss or approximate quantum of the claim;

(b) The Arbitrator erroneously sought to construe cl. 11(6) in the context of cl. 30.5 of the contract. We opine to this effect because cl. 11(6) imposes the need for the respondent to make an application making known its losses arising from any variation at the earliest possible time to ensure that the owners and architect of the project are not surprised by any late claims. The need to make the claim expeditiously is evident from the fact that cl. 11(6) contemplates the contractor being compensated for such loss/expense in the next interim certificate. Clause 30(5), on the other hand deals with the measurement and valuation of works pending issuance of final certificate. In other words, cl. 11(6) exist to deal with the ascertainment by the architect or the quantity surveyor as the case may be, of losses and expenses incurred by a contractor arising from a variation to the contract whereas cl. 30(5) deals with measurement and valuation of completed works by the Quantity Surveyor only.

[12] Accordingly, the Arbitrator, in our view, completely misdirected himself on the law as regards the construction to be placed on cl. 11(6) of the contract and this constitutes an error on the face of record which warrants the intervention of this court under s. 24 of the Arbitration Act. In our judgment, the construction of the clause in the contract between

A the parties to this appeal is clearly a question of law and consequently a matter that enables us to exercise our jurisdiction arising from the error on the face of the record pursuant to s. 24(2) of the Arbitrator Act 1952. (see *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd* [2004] 1 CLJ 743).

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[13] With respect, we do no not consider the conduct of the architect upon receipt of the late claims to be relevant on the facts of this case. We opine to this effect because cl. 11(6) exist for the protection of the appellant and not the architect. Accordingly, if the application/claim is not made in the manner required by cl. 11(6), in our opinion, it is well
C within the right of the appellant to object to the inclusion of such a claim pursuant to cl. 11(6) in the pending arbitration proceedings.

[14] As regards preliminary issue number 6, we observe that the Arbitrator ruled that any claim by the contractor "arising from a
D variation ordered by the architect cannot be separately maintained at commom law. Accordingly the Arbitrator ruled that insofar as claims for losses arising from variation orders issued by the architect were concerned, the respondent could only maintain the claim para. 15.B5 of the points of claim (see paras. 26 and 27 of the Interim Award at 578
E of Jilid 7 Bahagian C). We find no reason to interfere with this aspect of the Interim Award.

[15] Accordingly, we make the following orders in respect of the motion before us:

F (i) The notice of claims made by the respondent/claimant in relation to cl. 11(6) of the conditions of contract for direct loss and/or expense arising from instructions requiring variations issued by the Architect as pleaded in paras. 15.A9 and 15.A10 of the points of claim did not constitute valid applications pursuant to the aforesaid clause and
G consequently the respondent/claimant is not entitled to maintain the said claims in the arbitration;

(ii) We make no order on prayer b(ii) since the order of the Arbitrator on Preliminary Issue number 6 precludes the respondent from pursuing points of claim 15.A9 and 15.A10 under common law.

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(iii) We make no order on prayer b(iii) since matters relating to pleadings in the Arbitration proceedings are matters to be determined by the Arbitrator.

(iv) The respondent to pay cost of RM10,000 to the appellant. Deposit
I refunded to the appellant.